

2020 SPECIAL SESSION I

INTRODUCED

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SENATE BILL NO. 5076

Offered August 18, 2020

Prefiled August 17, 2020

A BILL to amend the Code of Virginia by adding a section numbered 40.1-27.4 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.3 through 40.1-33.16, relating to employees; paid sick time; civil penalties.

Patrons—Favola, Boysko and McClellan

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 40.1-27.4 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.3 through 40.1-33.16, as follows:

§ 40.1-27.4. Discharge of employee for taking unpaid sick leave prohibited.

A. No employer shall discharge, demote, or otherwise discriminate against an employee for being absent from work for any purpose set forth in subdivision B 1, 2, or 3 of § 40.1-33.4 or for any purpose set forth in subdivision B 1, 2, or 3 of § 40.1-33.5.

B. The provisions of subsection A apply only if the employee is not required to be compensated for such time off from work.

C. An employee who is discharged, demoted, or otherwise discriminated against in violation of subsection A is entitled to bring a civil action in a court of competent jurisdiction against an employer violating such provisions. Upon prevailing in such an action, the person aggrieved by a violation of this article is entitled to the remedies set out in subsection F of § 40.1-33.11.

D. For purposes of this section, "employer" means the same as that term is defined in § 40.1-33.3.

Article 2.1.

Paid Sick Time.

§ 40.1-33.3. Definitions.

As used in this article, unless the context requires a different meaning:

"Employer" means any employer as defined in § 40.1-2 that employs 21 or more employees. Notwithstanding § 40.1-2.1, "employer" includes the Commonwealth and its agencies, institutions, and political subdivisions. "Employer" does not include any agency of the federal government.

"Family member" means:

1. Regardless of age, a biological child, adopted or foster child, stepchild, legal ward, child to whom the employee stands in loco parentis, or individual to whom an employee stood in loco parentis when the individual was a minor;

2. A biological parent, foster parent, stepparent, adoptive parent, legal guardian of an employee or an employee's spouse, or an individual who stood in loco parentis to an employee when the employee or employee's spouse was a minor child;

3. An individual to whom an employee is legally married under the laws of any state;

4. A grandparent, grandchild, or sibling, whether of a biological, foster, adoptive, or step relationship, of an employee or the employee's spouse;

5. An individual for whom an employee is responsible for providing or arranging care, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment; or

6. Any other individual related by blood or affinity whose close association with an employee is the equivalent of a family relationship.

"Full-time employee" means an employee who works on average at least 30 hours per week or 130 hours per month.

"Part-time employee" means an employee works on average at least 20 hours per week but does not qualify as a full-time employee.

"Health care professional" means any person licensed under federal or state law to provide medical or emergency services, including physicians, nurses, and emergency room personnel.

"Paid sick time" means time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earns during hours worked and is provided by an employer to an employee for the purposes described in § 40.1-33.5; however, such hourly rate shall not be less than the minimum wage amount set forth in § 40.1-28.10 without reduction for any tip credit that the employer would otherwise be permitted to claim.

"Retaliatory personnel action" means a denial of any benefit provided pursuant to this article; any

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SB5076

59 threat, discharge, suspension, demotion, reduction of hours, or report of or threat to report an
60 employee's suspected citizenship or immigration status or the suspected citizenship or immigration status
61 of a family member of the employee to an agency of federal, state, or local government; or the taking of
62 any other adverse action against an employee as a result of the employee's exercise of any benefit
63 provided pursuant to this article, including the imposition of any sanction against an employee who is
64 the recipient of public benefits, as a result of the employee's exercise of any benefit provided pursuant
65 to this article. "Retaliatory personnel action" includes interference with or punishment for in any
66 manner participating in or assisting an investigation, proceeding, or hearing under this article.

67 "Year" means a regular and consecutive 12-month period as determined by the employer, except that
68 for the purposes of §§ 40.1-33.9 and 40.1-33.11, "year" means a calendar year.

69 **§ 40.1-33.4. Paid sick time; full-time and part-time employees.**

70 A. If the Governor has declared a state of emergency pursuant to § 44-146.17 in response to a
71 communicable disease of public health threat as defined in § 44-146.16, an employer shall provide all
72 of its full-time and part-time employees paid sick time. For full-time employees, an employer shall
73 provide 80 hours of paid sick time. For part-time employees, an employer shall provide a number of
74 hours equal to the number of hours that such employee works, on average, over a two-week period.
75 Such paid sick time shall be available for immediate use by the employee for the purposes described in
76 subsection B, regardless of how long the employee has been employed by the employer.

77 B. Paid sick time required by this section shall be provided to an employee by an employer for:

78 1. An employee's illness or health condition related to the communicable disease of public health
79 threat; an employee's need for medical diagnosis, care, or treatment of an illness or health condition
80 related to the communicable disease of public health threat; or an employee's need for preventive
81 medical care related to the communicable disease of public health threat;

82 2. Care of a family member with an illness or health condition related to the communicable disease
83 of public health threat; care of a family member who needs medical diagnosis, care, or treatment of a
84 mental or physical illness or health condition related to the communicable disease of public health
85 threat; or care of a family member who needs preventive medical care related to the communicable
86 disease of public health threat; or

87 3. Care for oneself or a family member when it has been determined by the health authorities having
88 jurisdiction or by a health care provider that the employee's or family member's presence in the
89 community may jeopardize the health of others because of his exposure to the communicable disease of
90 public health threat, whether or not the employee or family member has actually contracted the
91 communicable disease.

92 **§ 40.1-33.5. Additional paid sick time; full-time employees.**

93 A. In addition to any required paid sick time required by § 40.1-33.4, an employer shall provide all
94 of its full-time employees paid sick time. All full-time employees shall accrue a minimum of one hour of
95 paid sick time for every 30 hours worked. A full-time employee shall not earn or use more than 40
96 hours of paid sick time in a year, unless the employer selects a higher limit.

97 B. Paid sick time required by this section shall be provided to an employee by an employer for:

98 1. An employee's illness or health condition related to the communicable disease of public health
99 threat; an employee's need for medical diagnosis, care, or treatment of an illness or health condition
100 related to the communicable disease of public health threat; or an employee's need for preventive
101 medical care related to the communicable disease of public health threat;

102 2. Care of a family member with an illness or health condition related to the communicable disease
103 of public health threat; care of a family member who needs medical diagnosis, care, or treatment of a
104 mental or physical illness or health condition related to the communicable disease of public health
105 threat; or care of a family member who needs preventive medical care related to the communicable
106 disease of public health threat; or

107 3. Care for oneself or a family member when it has been determined by the health authorities having
108 jurisdiction or by a health care provider that the employee's or family member's presence in the
109 community may jeopardize the health of others because of his exposure to the communicable disease of
110 public health threat, whether or not the employee or family member has actually contracted the
111 communicable disease;

112 4. Closure of the employee's place of business by order of a public official due to the communicable
113 disease of public health threat; or

114 5. Providing care or arranging for care for a child whose school or child care provider is closed,
115 unavailable, or is only providing virtual learning due to the communicable disease of public health
116 threat.

117 C. Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) of the federal
118 Fair Labor Standards Act, 29 U.S.C. § 201 et seq., will be assumed to work 40 hours in each work
119 week for purposes of paid sick time eligibility and accrual unless their average work week is less than
120 40 hours, in which case paid sick time accrues on the basis of that average work week provided the

30-hour threshold is met.

D. Paid sick time as provided in this section shall begin to accrue at the commencement of employment or on January 1, 2021, whichever is later. An employer may provide all paid sick time that an employee is expected to accrue in a year at the beginning of the year.

E. Employees shall not be entitled to use accrued paid sick time until the ninetieth calendar day following commencement of their employment, unless otherwise permitted by the employer. On and after the ninetieth calendar day of employment, employees may use paid sick time as it is accrued.

F. Paid sick time remaining unused at the end of the year shall be carried over to the subsequent year. However, any carried-over sick time shall count toward the 40-hour limit on paid sick time provided for in subsection A, unless the employer selects a higher limit.

G. An employer shall be deemed to have satisfied the employer's duties under the provisions of this article and shall not be required to provide additional paid sick time if such employer has a paid time off policy that (i) is provided to employees in writing, (ii) provides employees with at least 40 hours of paid time off a year that can be used for the purposes set forth in subsection A of § 40.1-33.5, and (iii) includes notice of the information set forth in subdivisions A 3, 4, and 5 of § 40.1-33.7.

H. Nothing in this section shall be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued paid sick time that has not been used.

I. If an employee is transferred to a separate division, entity, or location within the Commonwealth but remains employed by the same employer, the employee is entitled to all paid sick time accrued at the prior division, entity, or location and is entitled to use all paid sick time as provided in this section. If an employee is separated from employment with an employer and the employee is rehired within 12 months of separation by the same employer, previously accrued paid sick time that had not been used shall be reinstated. Further, the employee shall be entitled to use accrued paid sick time and accrue additional paid sick time at the recommencement of employment.

J. When a different employer succeeds or takes the place of an existing employer, all employees of the original employer who remain employed by the successor employer are entitled to all paid sick time that they accrued when employed by the original employer and to use paid sick time previously accrued.

K. At its discretion, an employer may loan paid sick time to an employee in advance of accrual of paid sick time by such employee.

§ 40.1-33.6. Use of paid sick time.

A. Paid sick time shall be provided upon the request of an employee. Such request may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. When possible, the request shall include the expected duration of the absence.

B. When the use of paid sick time is foreseeable, the employee shall make a good faith effort to provide notice of the need for such time to the employer in advance of the use of the paid sick time and shall make a reasonable effort to schedule the use of paid sick time in a manner that does not unduly disrupt the operations of the employer.

C. An employer that requires notice of the need to use paid sick time shall provide a written policy that contains procedures for its employees to provide notice. An employer that has not provided to an employee a copy of its written policy for providing such notice shall not deny paid sick time to the employee based on noncompliance with such a policy.

D. An employer shall not require, as a condition of an employee's taking paid sick time, that an employee search for or find a replacement worker to cover the hours during which the employee is using paid sick time.

E. An employer may not require an employee to work an alternate shift to make up for the use of paid sick time.

F. Upon mutual consent by the employee and the employer, an employee may work additional hours or shifts to compensate for hours or shifts during which the employee was absent from work without using accrued paid sick time for the hours or shifts missed. However, the employer may not require the employee to work additional hours or shifts authorized by this subsection. If the employee works additional hours or shifts, the employer shall comply with any applicable federal, state, or local laws regarding overtime pay.

G. Paid sick time may be used in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

H. For paid sick time of three or more consecutive work days, an employer may require reasonable documentation that the paid sick time has been used for a purpose for which such leave is required to be provided as set forth in subsection A. Documentation signed by a health care professional indicating that paid sick time is necessary shall be considered reasonable documentation for purposes of this subsection. If an employer requires such documentation for the use of an employee's paid sick time and the employer does not offer health insurance to the employee, then the employer is responsible for

182 *paying all out-of-pocket expenses the employee incurs in obtaining the documentation.*

183 *1. Employees may donate accrued paid sick time to another employee if the other employee uses the*
184 *donated paid sick time for the purpose specified in this section and the employer has a policy that*
185 *allows an employee to donate paid sick time to a coworker for the purpose specified in this section.*

186 **§ 40.1-33.7. Exercise of rights protected; retaliation prohibited.**

187 *A. Neither an employer nor any other person shall interfere with, restrain, or deny the exercise of,*
188 *or the attempt to exercise, any benefit provided pursuant to this article.*

189 *B. An employer shall not take retaliatory personnel action or discriminate against an employee or*
190 *former employee because the person has requested or used paid sick time provided pursuant to this*
191 *article; filed a complaint with the Commissioner or a court or informed any person about any*
192 *employer's alleged violation of this article; participated in an investigation, hearing, or proceeding or*
193 *cooperated with or assisted the Commissioner in investigations of any alleged violation of this article;*
194 *or informed any individual of such individual's potential benefits under this article.*

195 *C. An employer's absence control policy shall not count paid sick time taken under this article as an*
196 *absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse*
197 *action.*

198 *D. Protections of this section shall apply to any person who mistakenly but in good faith alleges a*
199 *violation of any provision of this article.*

200 *E. There shall be a rebuttable presumption of unlawful retaliatory personnel action under this*
201 *section whenever an employer takes adverse action against an individual within 90 days of when that*
202 *individual:*

203 *1. Files a complaint with the Commissioner or a court alleging a violation of any provision of this*
204 *article;*

205 *2. Informs any person about an employer's alleged violation of this article;*

206 *3. Cooperates with or assists the Commissioner or other persons in the investigation or prosecution*
207 *of any alleged violation of this article;*

208 *4. Opposes any policy, practice, or act that is unlawful under this article; or*

209 *5. Informs any individual of benefits provided to that individual under this article.*

210 **§ 40.1-33.8. Notice and posting; civil penalty.**

211 *A. Each employer shall give its employees written notice of the following information at the*
212 *commencement of employment or by March 1, 2021, whichever is later:*

213 *1. That employees are entitled to paid sick time and the amount of paid sick time;*

214 *2. The terms of the use of paid sick time provided under this article;*

215 *3. That retaliatory personnel action against employees who request or use paid sick time is*
216 *prohibited;*

217 *4. That each employee has the right to file a complaint or bring a civil action if paid sick time as*
218 *required by this article is denied by the employer or the employee is subjected to retaliatory personnel*
219 *action for requesting or taking paid sick time; and*

220 *5. Contact information for the Department where questions about rights and responsibilities under*
221 *this article can be answered.*

222 *B. The notice required by subsection A shall be in English, Spanish, and any language that is the*
223 *first language spoken by at least 10 percent of the employer's workforce, provided that such notice has*
224 *been provided by the Department.*

225 *C. The amount of paid sick time available to the employee, the amount of paid sick time taken by the*
226 *employee to date in the year, and the amount of pay the employee has received as paid sick time shall*
227 *be recorded in, or on an attachment to, the employee's regular statement of earnings provided under the*
228 *requirements of § 40.1-29.*

229 *D. Employers shall display a poster that contains the information required by subsection A in a*
230 *conspicuous and accessible place in each establishment where such employees are employed. The poster*
231 *displayed shall be in English, Spanish, and any language that is the first language spoken by at least 10*
232 *percent of the employer's workforce, provided that such poster has been provided by the Department.*

233 *E. The Department shall create and make available to employers, in all languages spoken by more*
234 *than 10 percent of the Commonwealth's workforce and any language deemed appropriate by the*
235 *Department, model notices and posters that contain the information required under subsection A for*
236 *employers' use in complying with subsections A and D.*

237 *F. An employer that willfully violates the notice and posting requirements of this section shall be*
238 *subject to a civil penalty in an amount not to exceed \$100 for each separate offense.*

239 **§ 40.1-33.9. Employer records.**

240 *Each employer shall retain records documenting the number of hours worked by employees and paid*
241 *sick time taken by employees for a period of three years and shall allow the Department access to such*
242 *records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the*
243 *requirements of this article. When an issue arises as to an employee's entitlement to paid sick time*

under this article, if the employer does not maintain or retain adequate records documenting hours worked by the employee and paid sick time taken by the employee, or does not allow the Commissioner reasonable access to such records, it shall be presumed that the employer has violated this article, absent clear and convincing evidence otherwise.

§ 40.1-33.10. Regulations.

The Commissioner shall adopt appropriate regulations for the implementation and enforcement of this article.

§ 40.1-33.11. Enforcement; civil penalties; actions to recover amounts on behalf of employees.

A. The Commissioner shall enforce the provisions of this article. In effectuating such enforcement, the Commissioner shall establish a system utilizing multiple means of communication to receive complaints regarding noncompliance with this article and to investigate complaints received by the Commissioner in a timely manner.

B. Any person alleging a violation of this article shall have the right to file a complaint with the Commissioner within one year of the date the person knew or should have known of the alleged violation. The Commissioner shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee or other person reporting the violation, provided, however, that with the authorization of such person, the Commissioner may disclose the person's name and identifying information as necessary to enforce this article or for other appropriate purposes.

C. Upon receiving a complaint alleging a violation of this article, the Commissioner shall investigate such complaint and attempt to resolve it through mediation between the complainant and the subject of the complaint, or by other means. The Commissioner shall keep complainants notified regarding the status of their complaint and any resultant investigation. If the Commissioner believes that a violation has occurred, he shall issue to the offending person or employer a notice of violation and the relief required of the offending person or entity. The Commissioner shall prescribe the form and wording of such notices of violation, including any method of appealing a decision of the Commissioner.

D. The Commissioner shall notify any employer who he alleges has violated any provision of this article by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference with the Commissioner regarding such violation.

E. Any such employer who knowingly violates this article shall be subject to a civil penalty not to exceed \$150 for the first violation and, for subsequent violations that occur within two years of any previous violation, not to exceed \$300 for the second violation and not to exceed \$500 for each successive violation. In determining the amount of any civil penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final.

F. The Commissioner, with the written and signed consent of an employee, may institute a proceeding in a court of competent jurisdiction on behalf of an employee to enforce compliance with this article and to collect the following amounts from the employer that violated this article, which amounts shall be paid to the employee entitled thereto:

1. In each instance of paid sick time taken by an employee but unlawfully not compensated by the employer, for three times the wages that should have been paid under this article;

2. In each instance of paid sick time requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, for \$250;

3. In each instance of unlawful retaliation not including discharge from employment, for full compensation including wages and benefits lost, an additional amount of at least \$500, and equitable relief as appropriate; and

4. In each instance of unlawful discharge from employment, for full compensation including wages and benefits lost, an additional amount of \$1,500, and equitable relief, including reinstatement, as appropriate.

G. Upon entry of a final order of the Commissioner, or upon entry of a judgment of a court of competent jurisdiction, against the employer, the Commissioner or the court shall assess reasonable attorney fees.

H. The Commissioner shall annually report on its website the number and nature of the complaints received pursuant to this article; the results of investigations undertaken pursuant to this article, including the number of complaints not substantiated and the number of notices of violations issued; the number and nature of adjudications pursuant to this article; and the average time for a complaint to be resolved pursuant to this article.

I. Any person aggrieved by a violation of this article may file a complaint with the Attorney General. The filing of a complaint with the Attorney General shall not preclude the filing of a civil action under

§ 40.1-33.12. The Attorney General may bring a civil action to enforce the provisions of this article, in which action the Attorney General may seek injunctive relief of the imposition of civil penalties in such amounts as are authorized under this section.

J. Civil penalties owed under this article shall be paid to the Commissioner for deposit into the general fund. The Commissioner shall prescribe procedures for the payment of proposed assessments of civil penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and to pay a proposed civil penalty or a negotiated sum in lieu of such civil penalty without admission of any civil liability arising from such alleged violation.

§ 40.1-33.12. Civil actions.

A. Any person aggrieved by a violation of this article, or any entity a member of which is aggrieved by a violation of this article, may bring a civil action in a court of competent jurisdiction against an employer violating this article. Such action may be brought by a person aggrieved by a violation of this article without first filing an administrative complaint; however, a recovery under this section shall be in lieu of any recovery under subsection F of § 40.1-33.11.

B. Upon prevailing in an action brought pursuant to this section, a person aggrieved by a violation of this article shall:

1. Recover (i) a sum equal to twice the total of (a) the amount of any unpaid earned sick time and (b) the amount of any actual damages suffered as the result of the employer's violation of this article and (ii) reasonable attorney fees; and

2. Be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including, without limitation, reinstatement to employment, back pay, and injunctive relief.

C. The statute of limitations for a civil action brought pursuant to this section shall be for a period of two years from the date the alleged violation occurred or the date the person aggrieved by a violation of this article knew or should have known of the violation.

§ 40.1-33.13. Confidentiality and nondisclosure.

An employer may not require disclosure of the details of an employee's or an employee's family member's health information as a condition of providing paid sick time under this article. If an employer possesses health information about an employee or employee's family member, such information shall be treated as confidential and not disclosed except to the affected employee or with the permission of the affected employee.

§ 40.1-33.14. Encouragement of more generous paid sick time policies; no effect on more generous policies or laws.

A. Nothing in this article shall be construed to discourage or prohibit an employer from the adoption or retention of a paid sick time policy more generous than the one required by this article.

B. Nothing in this article shall be construed as diminishing the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan, or other agreement providing more generous paid sick time to an employee than required by this article. Nothing in this article shall be construed as diminishing the rights of public employees regarding paid sick time or use of paid sick time as provided in any law pertaining to public employees.

C. Nothing in this article shall be construed to supersede any provision of any local law that provides greater rights to paid sick time than the rights established under this article.

§ 40.1-33.15. Effect on other requirements.

This article provides minimum requirements pertaining to paid sick time and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of paid sick time or that extends other protections to employees.

§ 40.1-33.16. Public education and outreach.

The Department shall develop and implement a multilingual outreach program to inform employees, parents, and persons who are under the care of a health care provider about the availability of paid sick time required to be provided pursuant to this article. This program shall include the distribution of notices and other written materials in English, Spanish, and any language that is the first language spoken by at least 10 percent of the Commonwealth's population to all child care and elder care providers, schools, hospitals, community health centers, and other health care providers.

2. That the provisions of this act shall become effective on January 1, 2021.